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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~524.~~ ~~239~~ 12

THE VICKSBURG AND MERIDIAN RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

MARY E. O'BRIEN AND JOHN J. O'BRIEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED JUNE 25. 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 United States of America, Southern District of Mississippi.

Pleas and proceedings had and done at a regular term of the circuit court of the United States for the southern district of Mississippi, begun and held pursuant to law in the court-room of said court, in the city of Jackson, in said district, on the first Monday, being the 6th day of November, A. D. 1882.

Present and presiding: The Honorable R. A. Hill, United States district judge for Mississippi.

MARY E. O'BRIEN AND JOHN J. O'BRIEN
vs.
THE VICKSBURG & MERIDIAN RAILROAD COMPANY.

Be it remembered that heretofore, to wit, on the 20th day of April, A. D. 1882, the following transcript of the record of this cause in the circuit court of Warren county, in said district, was filed in the office of the clerk of this court, to wit:

2 MARY E. O'BRIEN
vs.
THE VICKSBURG AND MERIDIAN RAILROAD COMPANY. } 164.

Pleas and proceedings had before Honorable Upton M. Young, judge of the eleventh judicial district of the State of Mississippi, at a circuit court held in and for the county of Warren, at the court-house thereof, in the city of Vicksburg, on the 6th day of March, A. D. 1882.

Organization Court. March Term. 1882.

STATE OF MISSISSIPPI, *Warren County:*

Be it remembered, That on Monday, the 6th day of March, A. D. 1882, that being the first Monday of March, A. D. 1882, a regular term of the circuit court of Warren county, State aforesaid, was begun and held at the court-house in and for said county and State, in the city of Vicksburg, the time and place appointed by law for holding said court for the transaction of civil business.

3 There were present Hon. Upton M. Young, judge; R. F. Beek, sheriff; Chas. Lehman, clerk.

Be it remembered that on the 29th day of November, A. D. 1881, the plaintiff in this cause filed in the office of the clerk of said court the following:

Declaration.

STATE OF MISSISSIPPI, *Warren County:*

In the Circuit Court of said County. To December Term, 1881.

MARY E. O'BRIEN
vs.
VICKSBURG & MERIDIAN RAILROAD COMPANY.

Mary E. O'Brien and John J. O'Brien, her husband, plaintiffs, by attorney, complain of the Vicksburg and Meridian Railroad Com-

pany, a corporation existing by and under the laws of Mississippi, and of which Wm. M. Vosburg is cashier and treasurer, defendant, of a plea of trespass on the case.

For that whereas the said defendant heretofore, to wit, on the — day of September, 1881, was a common carrier of passengers
4 for hire between the city of Vicksburg and the city of Meridian, in said State, and between divers other places intermediate, including a place called the city of Jackson, and as such common carrier owned and used in and about its business a railroad track and divers engines, cars, and coaches, and the said plaintiff, Mary E. O'Brien, on the day and year aforesaid, desiring and intending to proceed by said defendant's railway as a passenger thereon from said city of Jackson to said city of Vicksburg, purchased of the said defendants, for a valuable consideration, a ticket entitling her to a seat in the cars of said defendant and to safe and convenient passage over said railroad from said city of Jackson to said city of Vicksburg; and thereupon said plaintiff, Mary E. O'Brien, entered a car of said defendant at said city of Jackson, then being ready to depart for said city of Vicksburg, which said car, with others, drawn by an engine of the said defendants, and in charge and under direction and control of defendant's officers, agents, and servants, then and there
5 proceeded upon the said journey with the said plaintiff Mary E. O'Brien, and others, as passengers; and the said plaintiffs say that it was therefore the duty of the said defendant to have a safe and secure railroad track, engine, and cars for the transportation of said plaintiff and others, and in all things to so carefully, skillfully, and prudently conduct themselves, and to construct, control, and manage their said railroad, engine and cars, as to deliver the said plaintiff Mary E. O'Brien safe at said city of Vicksburg, in convenient season, without hurt or injury; yet the said defendant, not regarding its duty in that behalf, had so carelessly, negligently, and unskillfully constructed and maintained its said railroad track, engine, and cars, and so carelessly, negligently, and unskillfully conducted itself in the management, control, and running of the same, as that the said plaintiff, Mary E. O'Brien, who was then and there in the observance of all due care on her part, was not delivered safe at said city of Vicksburg, but by and through the carelessness, negligence, and unskillfulness of the said defendant,
6 its officers, agents, and servants, the said car in which plaintiff was seated was thrown from said railroad track and overturned, and said plaintiff was greatly bruised, wounded, and injured in her person, insomuch that she became, and was for a long space of time, sick, sore, disabled, and helpless, and yet so remains; during all which time since the said injuries the said plaintiff Mary E. O'Brien has endured great bodily and mental pain and suffering, and the said plaintiffs have been forced and obliged to pay out large sums of money and incur large expenses and loss in endeavoring to have the said plaintiff Mary E. O'Brien cured of her said injuries and in and about her necessary support and maintenance; and the said plaintiffs have otherwise suffered great damage, to wit, to

the amount of thirty thousand dollars in all—for which sum the said plaintiffs sue and pray judgment, and also for costs, &c.

BUCK & CLARKE,
Att'ys for Pl'ffs.

7 Endorsed: Filed, and writ issued this 29th day of November, 1881. Chas. Lehman, clerk.

And on the same day the said clerk issued the following summons:

The State of Mississippi to the sheriff of Warren county, Greeting:

You are hereby commanded to summon The Vicksburg and Meridian Railroad Company, a body corporate, of which William M. Vosburg is cashier and treasurer, if to be found in your county, to be and personally appear before the circuit court, to be held at the court-house in and for the county of Warren on the first Monday of December next, to answer the complaint of Mary E. O'Brien and John J. O'Brien in an action whereby they demand to recover
8 of said defendant thirty thousand dollars damages for injuries to said plaintiffs; and have then and there this writ.

Witness my hand and the seal of said court, at office, in Vicksburg, the 29th day of November, A. D. 1881.

[SEAL.] CHAS. LEHMAN, *Clerk.*

Endorsed: I hereby appoint J. C. McCalloway special deputy to execute and return the within writ, this 29 day of Nov., A. D. 1881. R. F. Beck, sheriff of Washington county.

9 *Sheriff's Return.*

Executed on the within-named company, Vicksburg and Meridian railroad, by handing a member of said company a true copy of the within writ, this 30th day of November, A. D. 1881.

R. F. BECK, *Sheriff,*
By J. C. McCALLOWAY, *S. D. S.*

Ser.	$1 50
E. & R.	50
	$2 00

And afterwards, to wit, on the 5th day of December, A. D. 1881, the defendant filed the following

Plea.

In Warren Circuit Court, December Term, 1881.

MARY E. O'BRIEN, Plaintiff,
vs.
VICKSBURG & MERIDIAN RAILROAD COMPANY, Def'ts } 164.

And defendant, by attorneys, comes, and for plea says it is not guilty of the trespass in the declaration mentioned, and of this it puts itself upon the country; and pl'ffs do the like.

W. L. NUGENT, *P. D.*

10 To Mary E. O'Brien, or Buck & Clark, her attorneys.

You will take notice under above plea, on the trial of this cause, defendant will introduce evidence to show that pl'ff contributed to the injury, of which she complains, in such manner as not to entitle her to maintain this suit, and that long before the institution of this suit defendant paid all damages suffered and sustained by pl'ff, and of which she was entitled to payment, and that pl'ff has no right of action against defendant.

V. & M. R. CO.,
By W. L. NUGENT, *Att'y.*

Endorsed: Filed Dec. 5th, 1881. Chas. Lehman, clerk. By J. C. Griffith, D. C.

And on the 10th day of December, 1881, a day of the December term, 1881, the following order of court was entered on the minutes, to wit:

Plea Filed and Continued.

MARY E. O'BRIEN
vs. } 164.
THE V. & M. R. R.

11 And afterwards, to wit, on the 6th day of March, 1882, defendant filed the following petition for removal:

In the Circuit Court. To March Term 1882.

STATE OF MISSISSIPPI, *Warren County:*

Petition for Removal to the Circuit Court of the United States for the Southern District of Mississippi.

MARY E. O'BRIEN AND JNO. J. O'BRIEN
vs.
VICKSBURG AND MERIDIAN RAILROAD COMPANY.

To the circuit court of said county of Warren.

The petition of the Vicksburg and Meridian Railroad Company respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds exclusive of costs the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Mississippi, and that said Mary E. O'Brien and John J. O'Brien were then and still are citizens of the

12 State of Louisiana, and petitioner offers herewith a bond with good and sufficient surety for its entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and petitioner prays this honorable court to proceed no further herein except to make the

order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of Mississippi, and petitioner will ever pray.

W. L. NUGENT & BIRCHETT & GILLAND,
Attorneys for Petitioner.

STATE OF MISSISSIPPI, *Warren County:*

I, John D. Gilland, being duly sworn, do say: That I am a member of the firm of Birchett & Gilland, the attorneys for the petitioners in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

JOHN D. GILLAND.

13 Subscribed by the said John D. Gilland in my presence, and by him sworn to before me, this 6th day of March, 1882.

CHAS. LEHMAN,
Clerk of the Circuit Court of said County.
By J. C. GRIFFITH, *D. C.*

And on the same day was filed the following bond for removal:

Know all men by these presents, that the Vicksburg and Meridian Railroad Company, as principal, and A. M. Paxton, as surety, are held and firmly bound unto Mary E. O'Brien and John J. O'Brien in the penal sum of two hundred and fifty dollars, the payment whereof well and truly to be made unto the said Mary E. O'Brien and John J. O'Brien, their heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents; yet upon these conditions:

The said Vicksburg and Meridian Railroad Company having petitioned the circuit court of Warren county, State of Mississippi, for the removal of a certain cause therein pending, wherein said Mary E. O'Brien and John J. O'Brien are plaintiffs and the said Vicksburg and Meridian Railroad Company is defendant, to the
14 circuit court of the United States in and for the southern district of Mississippi:

Now if the said The Vicksburg and Meridian Railroad Company shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and virtue.

Witness the hands and seals of the parties, this 6th day of March, 1882.

VICKSBURG & MERIDIAN RAILROAD COMPANY,
Per E. F. RAWORTH, *Gen'l Sup't.* [SEAL.]
A. M. PAXTON. [SEAL.]

Endorsed: Filed this 6th day of March, 1882. Chas. Lehman, clerk, by J. C. Griffith, D. C.

15 And afterwards, to wit, on the said 6th day of March, 1882, a day of the said March term A. D. 1882, the said court made its order of removal, which was entered upon the minutes of said court in the following words and figures:

MARY E. O'BRIEN and JOHN J. O'BRIEN
vs.
THE VICKSBURG AND MERIDIAN RAILROAD COMPANY.

The defendant in the above-styled case this day presented and filed its petition for a removal of this case to the circuit court of the United States for the southern district of Mississippi, together with its bond, as required by law, in the penalty of two hundred and fifty dollars, with A. M. Paxton as surety thereon; and now it is ordered by the court that said bond and surety be, and are hereby, accepted and approved, and the record of this case ordered to be removed into the aforesaid circuit court of the United States, and that no further steps be taken in this case in this court.

16 THE STATE OF MISSISSIPPI, *Warren County.*

I, Chas. Lehman, clerk of the circuit court, in and for said county and State, do hereby certify that the foregoing fourteen pages contain a full, true, and correct transcript of all the papers filed and all the proceedings had in said court in the above cause of Mary E. O'Brien *et al. versus* The Vicksburg and Meridian Railroad Company, numbered on the docket of said court 164, as the same appears of record and on file in my office.

Given under my hand and the seal of said court at office, in the city of Vicksburg, this 15th day of April A. D., 1882.

CHAS. LEHMAN, *Clerk,*
By J. C. GRIFFITH, *D. C.*

Endorsed: "Filed Apr. 20, 1882. J. M. McKee, *Clk.*"

And afterwards, to wit on the 23rd day of November A. D., 1882, the same being a day of the regular November term of said
17 circuit court, the following proceedings were had in said court, and entered of record upon the minutes thereof, in the words and figures following, to wit:

MARY E. O'BRIEN and JOHN J. O'BRIEN
vs.
VICKSBURG & MERIDIAN RAILROAD COMPANY.

This day came the parties by their attorneys, and issue being joined it is ordered that a jury come, whereupon came a jury of good and lawful men as follows, to wit: W. G. Kearney and eleven others, who being duly elected, empanelled, sworn and charged, and the issue submitted to them, upon their oath say, "We, the jury, find for the plaintiffs the sum of nine thousand dollars," and thereupon the defendant, by its attorney, in open court giving notice of its intention to move the court in arrest of judgment upon said verdict,

and filing their written motion therefor, judgment is sus-
18 pended to abide the action of the court upon said verdict.

And on the 23rd day of November, A. D. 1882, during the progress of the trial of said cause and before the same was submitted to the jury, the defendant tendered to the court its three bills of exceptions, numbered 1, 2, and 3, which were signed by the judge of said court and ordered to be filed as a part of the record of said cause, and are in the words and figures following, to wit:

Bill of Exceptions No. 1.

19 In the Circuit Court of the United States for the Southern District of Mississippi. November Term, 1882.

MARY E. O'BRIEN and JOHN J. O'BRIEN, her husband,
vs.
THE VICKSBURG AND MERIDIAN RAILROAD COMPANY. } 2867.

Be it remembered that at the term aforesaid of the court aforesaid, and on the 23rd day of November of said term, this cause came on to be tried before a jury lawfully empanelled, and after reading the pleadings and making proof as to the happening of the accident to plaintiff, Mary E. O'Brien, plaintiffs offered to read the deposition of one R. A. Quim, M. D., and did read the first, second, and third interrogatories propounded to him, and the answers thereto, in the words and figures following, to wit:

Int'g 1. What is your name, place of residence, and profession; if your profession is that of a surgeon and physician, state of what school of medicine & surgery you are a graduate, and where
20 and how long you have been in the active practice of your profession; what are your professional relations to the defendant in this case?

Answer to first interrogatory:

My name is R. A. Quin, reside in Vicksburg, Miss., and am a graduate of the College of Physicians and Surgeons, New York. Have been actively engaged in practice eleven years, and am the *the* physician and surgeon to the Vicksburg and Meridian railroad at this point.

Int'g. 2. Were your professional services called for about the middle of September, 1881, to defendant, Mrs. Mary E. O'Brien? If so, state if you visited her; where you found her, and if ill or wounded; what you found to be the cause of her condition, as ascertained either by an examination of her, or from her own representations.

Answer to 2nd interrogatory:

21 I was called to see Mrs. O'Brien on the 16th of September, 1881, finding her at the house of her brother-in-law, Thos. R. Roach, in Vicksburg. Found her suffering extreme pain and in a very nervous condition, resulting from a railroad accident which occurred a few hours previous on V. & M. R. R. I knew her to be suffering from the result of wounds received in the above accident from her own answers, from her brother-in-law's statement, and from attending several others on the train with her.

Int. 3. Look on the accompanying statement, dated November 26th, 1881, and state if it was written by you at the date it bears, for what purpose it was written, and to whom it was delivered. Does the statement represent substantially and correctly Mrs. O'Brien's condition as it appeared when you first saw her, and as it continued up to November 26th, 1881?

Answer to interrogatory 3rd:

I have looked upon the statement referred to, which was
22 written by myself, at Mr. O'Brien's request, at the date mentioned, when he was about to take his wife away from here to his home in New Orleans, and was intended to convey an idea of how she was when I was called to see her, and what her condition was when she left my charge; and in my opinion I correctly stated her condition at times referred to."

And thereupon plaintiffs offered to read to the jury, as part of the evidence, the statement referred to in said third interrogatory, which was attached to said deposition and interrogatories, which is in the words and figures following, to wit:

Exhibit in Deposition of Dr. R. A. Quin. Lay Lindsey, U. S. Com.

I was called to see Mrs. Jno. J. O'Brien on or about the 16th of September last.

Found Mrs. O. suffering from the result of a railroad acci-
23 dent which had occurred a few hours before. Upon examination found her suffering agony; bruises over different portions of her body, especially over right hip, abdomen, lower part, and a swelling on back of neck, just below base of skull, very sensitive to touch, and from which seemed to emanate a great deal of pain, leading to the suspicion that the spine, upper portion, and base of brain had received a severe shock. Since that injury she has continued to complain every day or at night with nervous headache, sleeplessness, and, I may say, an entire derangement of the nervous system. Found the womb had been injured by being jarred so as to be displaced; the bladder in sympathy, causing a very frequent and painful desire to pass water, which still continues to some extent.

She still continues in a weakened, highly nervous condition, with *with* pretty much the same symptoms of suffering present (except at very short intervals, but never entirely free of pain), as was manifested in the earlier period of her injury.

24 In conclusion, I would say that it is impossible for me to state how long the condition of her physical and nervous system may remain as it is now, or how long she may require medical attention, her utter loss of appetite, the weakened condition of her nervous system, the inability to walk without support, are the chief factors precluding an early recovery.

Very respectfully, R. A. QUIN.

To Mr. JNO. J. O'BRIEN.

But the defendant objected to the reading of said statement, be-

cause it was not made by said Quin under oath, and in defendant's hearing, or with their knowledge and consent, because it was hearsay evidence at best, and could only be referred to by this witness in any event so as to refresh his recollection at best, and was wholly incompetent in this proceeding. The court overruled said objection and permitted said statement to be read in evidence. To which ruling of the court defendant then and there instantly excepted, and its exception was allowed.

25 But the court, at the instance of plaintiff and against the objection of defendant, required defendant, along with said exception, to incorporate the residue of the deposition of said Quin on examination-in-chief and cross-examination, which was read to the jury after the taking of said exception. All of which is accordingly done, in the words and figures following, to wit:

Int'y 4. Was the origin or cause of Mrs. O'Brien's inability to walk, as mentioned in the statement, to be ascribed in any degree to the injury and displacement of the womb and sympathetic condition of the bladder, as therein described? If so, to what extent was that inability to be ascribed to these causes, and what other cause, if any, contributed to produce this inability.

Answer to interrogatory 4th:

Mrs. O'Brien's inability to walk was attributable to her
26 bladder trouble, also womb trouble and injury to hips. I do not know of any other cause that might have produced in her that inability.

Int'g. 5th. Are displacements of the womb by violence accompanied by symptoms such as described in your statement readily cureable, or are they most generally permanent in their displacement and effects; what has been your experience and observation as a medical man with cases of this character?

Answer to interrogatory 5th:

Displacements of the womb, occurring from violence, are sometimes cured, but frequently very difficult to cure; my experience has been that few women who suffer from displacement of the womb are ever entirely cured.

Int'g. 6th. Taking as a basis of opinion, the facts, as conceded, that Mrs. O'Brien's inability to walk without aid, and when she attempted to do so falling down, continued for months after
27 she ceased to be under your charge, or up to this time; in connection with your knowledge of her case, what in your opinion as a medical man are her chances of permanent relief from her womb trouble, and restoration to health; and, if such relief and restoration can be had, within what time?

Answer to interrogatory 6th:

Taking into consideration the above facts, the shock to Mrs. O'Brien's nervous system, the displacement of the womb and accompanying suffering, it is impossible for me to state how long she may be a sufferer; I do not think her womb will ever be entirely relieved unless it occurs at the climateric or change of life; then I

think it quite possible the organ may become so far restored as to relieve her of all suffering.

Int'g. 7. Please state more fully the nature and extent of the injury to the hip, and *and* that at the base of the skull leading to the suspicion that the spine and brain had received a severe shock; did the symptoms produced by these injuries continue while she was under your charge?

Ans. to interrogatory 7th:

When called to see Mrs. O'Brien, and making a careful examination of the hip (for she was complaining of such pain as to lead me to suspect a dislocation or fracture), I found the hip joint much discolored, very tender to the touch, unable to place the foot of that limb to the floor; but finding no fracture or dislocation, I decided that the head of the bone had received a violent jar from a blow on the hips that caused the violent pain, and no doubt assisting in the displacement of the womb. She had a large swelling at the base of the skull excessively tender to the touch, and at times causing excruciating pain, which continued off and on during the entire time I had charge of her case. I think a blow severe enough to have caused that swelling and leaving a large lump, which remained up to the time I last saw her, was sufficient cause to account for the shock to the brain and spine.

Int'g 8. Considering Mrs. O'Brien's injuries by this accident, and her resultant symptoms and sufferings, as defined and detailed in your statement, up to the time she was removed from your charge, please give your opinion, as a medical man, of the seriousness and gravity of these injuries, and the chances of her being an invalid for life, as against those for her restoration to a sound, healthy condition?

Answer to interrogatory 8th:

Taking all of the above facts into consideration, I give it as my opinion that Mrs. O'Brien will always be a sufferer to some extent, at least from the injuries she received and for which I treated her.

Int'g 9. How long was Mrs. O'Brien under treatment by you; where did she go when she left you; if to New Orleans, how was she conveyed from her sick room to the cars, was she able to walk or had she to be carried; while under your charge was it necessary for some one to sit up with her at night; if so, who was the nurse; what was your bill for medical services to Mrs. O'Brien?

Answer to interrogatory 9th:

Mrs. O'Brien was under my treatment, I believe, nearly three months. She went to New Orleans; she was carried from her sick room to a hack, and then conveyed in a hack to the cars. It was necessary for some one to sit up with her nearly all the time. Mrs. Roach nursed her, also Mrs. Kirkpatrick, her mother, Mr. T. R. Roach, Mrs. J. B. Brown, Miss Mabel Brown, and a portion of the time a colored woman named Clara. My medical bill was rendered, as well as I remember, for four hundred dollars.

Int'y 10. State any other fact within your knowledge material to the issue in this case.

31 Answer to interrogatory 10th:
I know of no further facts in the case.
BUCK & CLARK, *For Pl'ffs.*

Cross-interrogatories:

X 1. What was Mrs. O'Brien's physical condition before the accident spoken of? We mean in respect to her womb, bladder, spine, and nervous system.

Answer to cross-interrogatory 1st:

I had not seen Mrs. O'Brien for several years previous to the accident, and had never treated her. When I last saw her previous to the accident she appeared to be in good health.

X 2. Do you know what produced the injuries of which Mrs. O'Brien complained when you were called on to see her, or did you speak from information communicated by her and others as to the matter?

Answer to cross-interrogatory 2nd:

32 I know what produced her condition from an examination of her case, from questions put to her, and from the statement of her brother-in-law, Mr. T. R. Roach, who was on the train with her.

X 3. Where did you last see Mrs. O'Brien, and when did you last examine her?

Answer to cross-interrogatory 3rd:

I last saw Mrs. O'Brien on 27th Nov., 1881, I saw her professionally, but made no minute examination of her case as I had done that before.

X 4. In the light of after experience and after acquaintance with Mrs. O'Brien's case, in what respect, if any, would you alter or change the written opinion of Nov'b., 1881, attached to this? What do you now think of her case? Please answer fully.

NUGENT & McWILLIE,
For Def't.

Answer to cross-interrogatory 4:

33 I entertain no other opinion than that given to Mr. O'Brien in writing. Have not seen her for several months and can only state from hearsay that she has not improved much.

My opinion of her case up to the last time I saw her was that her health might be permanently injured and that there were some symptoms connected with her condition which would last for years.

R. A. QUINN.

Sworn to and subscribed before me this 13th day of July, 1882.
[SEAL.] LAY LINDSEY,
U. S. Commissioner.

34 To which ruling of the court in so requiring defendant to insert the balance of said deposition, afterwards read, defendant then and there excepted, and its exception was allowed.

And be it further remembered that on the said trial plaintiffs in-

troduced T. R. Roach as a witness in their behalf, who was sworn and examined; and during his examination said witness was asked if he did not have a conversation with Morgan Herbert, the engineer having charge of defendant's train at the time of the accident, shortly after the accident, about the rate of speed at which the train was moving at the time; and, if so, what said Herbert said; but the defendant objected to said question as being entirely incompetent, for the reason that the corporation could not be charged because of any such statement so made by any of its servants. The court overruled said objection and permitted said statement to be made, and defendant then and there instantly excepted, and his exception was allowed.

Said witness having, before the question was asked, stated that on examination of the track after the accident he found a cross-
35 tie or cross-ties under the broken rail in a decayed condition, replied to said interrogatory as follows:

Between ten and thirty minutes after the accident occurred I had such a conversation with Morgan Herbert, the engineer having charge of the locomotive attached to the train at the time of the accident, and he told me the train was moving at the rate of eighteen miles an hour.

Defendant then moved to exclude the answer of said Roach to said question because it was pure hearsay, and because said Herbert, locomotive engineer, could not by any such statement charge defendant with liability; but the court overruled said motion, and defendant then and there instantly excepted, and its exception was allowed.

There was other proof showing that the schedule time between Jackson and Vicksburg was two hours and thirty minutes, and the distance between the two points 45 miles.

And be it further remembered that on said trial the plaintiffs, after introducing evidence tending to prove that the cause of the accident was a broken rail and a defective cross-tie lying under the rail that was broken, offered to read to the jury a report made by E. F. Raworth, superintendent of the Vicksburg and Meridian rail-
road, on the first of March, A. D. 1880, to Thomas Rigby,
36 president of defendant company, for the purpose of showing the condition of said railroad at that time, in the words and figures following, to wit:

Roadway.

So far as the track is concerned my report will not be encouraging. We have suffered from heavy rains, causing cuts to cave in and embankments to slide, and in many places overflowing the road, doing damage not only by interruption of traffic, but by causing the necessary additional expenses which accompany such troubles. The effects of wet weather are mostly shown in the pra-rie soil, over fifty miles of which our track is laid. No ballast being on this road-bed we are compelled to keep our track hands constantly employed to make the track passable, making no permanent improvements. The rails in this soil bend and twist out of shape, and

either break themselves at the base where joints are made or break the chairs which support the joints, thereby rendering the already imperfect joints still more unsafe. Without ballast we are obliged to block and wedge up the ties with wood blocks and wedges,
37 else the track would disappear entirely in the mud. This process does not improve the condition of the track permanently, but only affords us a "makeshift" for the time being to enable us to pass our trains slowly over. The continued wear and use of track is telling seriously upon the rails; and I cannot too earnestly recommend that some provision be made this year for getting your road well ballasted, and, as such work can be done in summer only, the importance of immediate action should impress you. I feel that your track has reached a point where it is so defective that we will be compelled to reduce the speed of our trains, which now, though very slow when compared with other roads, is becoming too fast for the safety of passengers. You have 81½ miles of fifty-pound rail, much of which is badly laminated. This rail has been in constant service for twenty-one years, and the only renewal is over one mile, or about eighty-four tons. The record of this rail, considering the difficult strains upon it,
38 is, wonderful, and shows the good material of which it is composed. There are twenty-five miles of your track made of the iron, laid down upon the road originally, and 42 years in *in* service. Its original weight was forty-five pounds to the yard; now it is almost entirely worn out and when taken up is fit only for the rolling-mill. This old rail should be removed at once, and the track put in condition to make reasonable speed, so that we can take advantage of the improved connections which are offering, and from some of which we derived the increased business, which our past year's operations exhibit. Economy has been the principle that has guided the management of every department, and so rigidly has this been enforced that we find ourselves now in a condition that means must be employed and money spent to enable the road to be operated at all. The bridges and tressels are in good condition.

Motive Power.

39 The report of the master mechanic will give you such details of the operation of his department as will best serve to show the condition of the motive power of the road. I shall simply add that our locomotives have been in constant employment, and have been pressed to their utmost capacity; two of those reported in service in my last report have been condemned, one being twenty and the other nineteen years old. We have ordered two new ones from the Baldwin works, and their presence will be very opportune, as the constant employment of those now in service gives us no opportunity to make needed repairs. We have rebuilt the boiler of the engine Georgia, and, by using her machinery, will have a very serviceable machine.

Cars.

Our rolling-stock is in a very depleted condition. Taking into con-

sideration the heavy tonnage handled and the statement of our effective cars, you can but wonder at the results accomplished;
40 we are often compelled to reject cheap freights on account of our scarcity of cars. The cars left after the war have been from time to time condemned, and the additions made have been so slight that we find ourselves with the small list furnished below. In 1869 Mr. W. E. Morris, then the appointee of the bondholders to examine the condition of the road, recommended the building of one hundred cars, only a portion of which, 34 boxes and 20 flats, were built until last year, when we built 24 flat cars, but, these being devoted exclusively to coal business, are of no utility for general freight purposes.

But the defendant objected to the reading of the report of said Raworth, superintendent, &c., because the same was not competent evidence in any event to charge defendant with an injury received at a particular point of the track; and that it was made at a period of time too remote from the date of the disaster; and the court overruled this objection, and the defendant then and there in-
41 stantly excepted, and his exception was allowed.

There was proof in the further progress of the cause tending to show that the portion of the track on which the accident happened was a part of that referred to in this report. That the rail which broke was one of the rails designated in this report as 42 years in service, and of the original weight of 45 pounds to the yard. That the engines and cars now run on the road are six or seven tons heavier than those in use when this iron was laid, and that no recommendations of this report had not been carried out, on this part of the road, by the company, prior to the accident which occurred on Sep. 16th, 1881. The report was proved to have been made to the president and board of managers in Feb'y, 1880.

Also proof on behalf of defendant tending to show that the broken rail had been, with others, on some portions of the track, taken up and welded some years prior to the accident; also that the Memphis & Vicksburg Railroad, now in course of construction, is laying down 55 pound steel rails; also that defendant was engaged
42 in laying new rails on this portion of the track, and had approached near to the point at which the accident occurred, viz., one mile and a half therefrom.

To all which aforesaid rulings of the court defendant excepted as aforesaid, and prayed that this his first bill of exceptions may be signed, sealed, enrolled, and made part of the record in this cause. All of which is accordingly done the day, year, and term aforesaid, and before the jury retired from the bar.

R. A. HILL, *Judge*. [SEAL.]

Bill of exceptions number 2 is in the words and figures following, to wit:

43 *Second Bill of Exceptions.*

In the Circuit Court of the United States for the Southern District of Mississippi. November Term, 1882.

MARY E. O'BRIEN and JOHN J. O'BRIEN, her Husband,
vs. } 2867.
THE VICKSBURG AND MERIDIAN RAILROAD COMPANY.

Be it remembered that at the term aforesaid of the court aforesaid, and on the 23rd day of November of said term, this cause came on to be tried before a jury lawfully empannelled, and after the plaintiff had closed his evidence defendant exhibited to the court the pamphlet from which plaintiff had read the report of E. F. Raworth, superintendent, referred to in the first bill of exceptions filed herein, showing that said report of said Raworth was connected with the report of Thomas Rigby, president of defendant company, and W. M. Vosburg, secretary and treasurer thereof, all of which reports were made to the stockholders of said company at their annual meeting in March, 1880, and as explanatory of said report
44 of said Raworth, offered to read the report of said Rigby, president, and Vosburg, secretary and treasurer, made at that time in the words and figures following, to wit:

VICKSBURG AND MERIDIAN RAILROAD,
OFFICE OF THE PRESIDENT,
VICKSBURG, MISS., *March 1st*, 1880.

To the stockholders and board of managers:

GENTLEMEN: For the fiscal year just closed your business has been as follows:

Receipts		$424,389 22
Operating expenses		295,002 35
Net earnings		$129,386 87

From which should be deducted for—

New locomotives	3,036 24	
New cars	13,861 90	
Washingston street bridge	4,912 50	
New depot	288 78	
General salaries	9,471 65	
Contingent expenses	2,609 72	
Taxes	14,389 25	
		48,570 04
Leaving a nett revenue of		$80,816 83

The earnings were increased $95,213.43.
The working expenses were increased $35,862.56.

45 The company has labored under some embarrassments during the year, by reason of several old debts which were com

promised, absorbing our entire net revenue. The particulars of these appear in the treasurer's report. The business of the road has shown a marked improvement, as the tabular statements from the several departments will exhibit. The report of the treasurer shows $699.70, delivered to me on account of land sales, which amount was taken to balance former purchases of bonds, account of land funds.

One more link in our circle has been broken. The hand of death has again been laid upon our membership, and we are called upon to mourn the demise of Dr. Morris Emanuel, who, honored and beloved by us all, departed this life on the 20th of May, having been connected with the company since its organization, and having filled the important position of vice-president, and afterwards for many years of president. He gave his undivided time and attention to its service to the sacrifiice of his personal interests,
46 and by his intelligent and efficient administration guided the affairs of the company through many trying periods, and left us only when his physical condition was so impaired as to make it impossible for him to give that constant attention which always marked his conduct of our affairs. He passed away respected by all who knew him, and left us with the pleasant memories which accompany the recollection of a good and true man.

It gives me pleasure to refer to the services of the officers and employees of the company, as being characterized by the zeal and fidelity which has heretofore marked their management of the affairs entrusted to their care.

THOMAS RIGBY, *President.*

Secretary and Treasurer's Report.

To the President and Managers.

GENTLEMEN: I herewith submit to you a statement of the business of my office for the fiscal year ending February 29th, 1880.
47 Of the consolidated mortgage bonds $1,600.00 have been issued during the past year; the total amount of each class now issued being—

First class, or red, endorsed	$705,000
Second class, or blue, endorsed	850,000
Third class, or black, endorsed	145,000
Fourth class, unendorsed	1,180,700
	$2,880,700

Of which there are in the sinking fund—

First class	$57,500	
Second class	21,000	
Fourth class (Gray & Kennedy)	1,700	
		80,200
Leaving balance outstanding		$2,800,500

There has been $2,322.50 of preferred stock scrip issued during the year, the total issue now being $1,042,517.60.

The tonnage dues on the river extension amounted to $12,216.00, being sufficient to pay the interest and nearly $7,000.00 towards the extinguishment of the debt, total amount of which on February 29th was but little over $44,500.00.

48 The judgment against this company in favor of I. C. Plant has also been settled during the past year, amounting, principal and interest, to $68,328.85. The bonds thus retired have been placed in the sinking fund to credit of the land account.

The floating debt is as follows:

Bills payable outstanding Feb'y 28, 1879	$37,546 60
Bills payable issued during the past year	29,200 33
	$66,746 93
Bills payable paid during past year	25,301 19
Bills payable outstanding February 29, 1880	41,445 74
Due bills issued for wages	1,768 53
Due on open account and pay-rolls	13,774 53
	$56,988 80
From which should be deducted amount of bills payable on which judgments have been obtained	16,200 00
	$40,788 80
To which add balance due on said judgments	8,889 22
To which add balance due on judgment to United States	4,665 72
Total amount of floating debt Feb'ry 29th, 1880	$54,343 74
Total amount of floating debt February 28th, 1879	48,725 90
Increase	$5,617 84

49 I hand you also with this a statement of the receipts and expenditures for the past fiscal year and balance sheet of the general ledger on February 29th, 1880.

W. M. VOSBURG,
Secretary and Treasurer.

50 *W. M. Vosburg, Treasurer, in Account with the Vicksburg and Meridian Railroad Company. Receipts and Disbursements for the Fiscal Year ending February 29, 1880.*

DR.

Railroad Earnings:		
Passenger account	130,270 10	
Freight account	274,425 67	
Mail	7,489 32	
Incidental receipts	12,204 13	
	$424,389 22	
Less due by agents and conductors	4,439 01	
Earnings of & receipts from foreign roads		419,950 21
		53,955 15
Charges received from agents		155,569 26
Sundry balances		2,982 63
Bills payable issued		29,200 33
Bills receivable collected		9,167 06
Interest account		553 96
Rents and wharfage from river landing		5,587 00
Lands sold		2,052 25
Balance Feb'ry 29th, 1880		14,924 89
		$693,942 74

CR.

Railroad Expenditures:		
Conducting transportation	82,158 86	
Motive power	73,571 75	
New locomotive	3,036 24	
Maintenance of way	98,010 55	
New iron	10,845 11	
Maintenance of cars	27,788 91	
New cars	13,861 90	
New bridge at Washington street	4,912 50	
New depot	288 78	
		$314,474 60
Charges advanced to agents		155,569 26
Paid foreign roads		51,589 07
Contingent expenses		2,609 72
General salaries		9,471 65
Bills payable paid		19,901 19
Bills receivable received		12,189 70
Interest		626 97
Extension tonnage dues		12,216 00
Tax account		14,389 25
Emily F. Anderson, settlement of judgment		5,506 65
United States, on account of judgment		1,020 00
Extension to Mississippi river		4,589 92
Gray & Kennedy mortgage		124 50

Railroad loan fund	$124 00
Notes issued to circulate as money	1,337 95
I. C. Plant, judgment settled	68,328 85
Land and preferred stock scrib taken up	87 87
Jas. R. McDowell, account of Judgment	3,000 00
Balance February 28th, 1879	16,785 59
	$693,942 74

51 *Balance Sheet of General Ledger of the Vicksburg and Meridian Railroad Company, February 29, 1880.*

DR.

Cost of road and equipment	$3,046,563 88
Cost of extension to Mississippi river	88,542 79
Cost of Mississippi river landing front	50,100 00
Extension tonnage dues	60,009 93
Bills receivable	38,185 53
Profit & loss	1,294,330 80
	$4,577,732 93

CR.

Capital stock	$357,407 69
Preferred stock	1,042,517 60
Funded debt	3,135,522 76
Bills payable	41,445 74
Land scrip	839 14
	$4,577,732 93

52 But the pl'ff objected, and court sustained said objection, and would not permit said reports to be read, and defendant excepted, and the exception was allowed.

And be it further remembered that afterwards, &c., &c., defendant introduced as a witness in its behalf the said E. F. Raworth, superintendent, who, on his cross-examination by plaintiff, was asked if the report read in evidence to the jury by plaintiff, as stated in the first bill of exceptions, was not made by him; and having stated that it was, and represented fairly certain portions of defendant's road at that time, witness was further asked if he had not made a similar representation to the management in 1874; but defendant objected to the question because the period of time was too remote, and because defendant could not be thus charged with a liability for the accident which occurred at a well-defined point of its track, and, as plaintiff's evidence tended to show, because of a defective cross-tie then resting in the road-bed; the court having overruled the objection, and defendant excepted, and his exception was allowed.

53 To which said ruling of the court defendant excepted, and prayed that this its second bill of exceptions be signed, sealed, enrolled, and made a part of the record in this court; all of which

is accordingly done the day, year, and term aforesaid, and before the jury retired from the bar.

R. A. HILL, *Judge*. [L. S.]

Bill of exceptions No. 3 is in the words and figures following, to wit:

54 *Third Bill of Exceptions.*

In the Circuit Court of the United States for the Southern District of Mississippi. November Term, 1882.

MARY E. O'BRIEN and JOHN J. O'BRIEN, her Husband, *v.* VICKSBURG AND MERIDIAN RAILROAD COMPANY. } 2867.

Be it remembered that at the term aforesaid of the court aforesaid, and on the 23d day of November of said term, the defendant herein introduced evidence proving, or tending to prove, the following fact: That R. H. Smith was the section-master of defendant company, having the charge and supervision of that part of its track on which the accident occurred; that it was, among other things, the special duty of said Smith, as such section-master, to keep in safe condition the road-bed, rails, cross-ties, and track of defendant on his section for the passage of trains and to examine and inspect the same daily for this purpose; that the said Smith was an educated, competent, prudent, careful, and skillful section-mas-
55 ter; that on the evening before the accident, about the close of the day, the said Smith passed over his section of defendant's track, including the point at which the accident occurred, and discovered nothing to attract his attention or remotely suggest that — was or could be any danger at that point to the passenger train that was to pass over his section on the next morning about daylight; that the cause of the accident was the breaking of a rail, growing out of a latent defect, which could only have been discovered by taking the rail up and breaking it; but there was also proof tending to show the very reverse; that this rail so broken was constituted of two old rails which had been purchased by the company forty-two years ago, but which were taken up in 1873 or 1874, the defective parts sawed off, the residue brought together and welded, and the rail, as thus restored, passed thro' the company's shops and relaid; that when laid down on the track this rail so made up was in a safe condition, equal to any that steel of equal weight—forty-five pounds—and of the same age; that two trains passed daily on defendant's road going east and two going west, a passenger train and
56 a freight train; that on the morning of the accident the locomotive, tender, baggage car, and smoking car of the train passed safely over this rail, which was broken: that the train was running at the rate of fifteen miles an hour at the time of the accident; that defendant was then engaged in the reparation of its road-bed, laying new rails and putting down new cross-ties wherever needed, and gotten in the work of repair and rehabilitation within

a short distance of the point where the accident occurred; that the order given to conductors and engineers was to move over the old rails laid on the defendant's track, and constituting a part of its continuous track from Jackson to Vicksburg, at a rate of speed not exceeding fifteen miles an hour, and that the train, at the time of the accident, was running at that rate of speed; that for the traffic to which it was subjected, and for trains moving at the rate of fifteen miles an hour, the rail in question was, to all outward appearances,
and as far as could be discovered by external observation,
57 good and safe, and that rails of similar character are now, and
have been ever since this accident, in use on defendant's main track, though the work of rehabilitation is still progressing, and they are taken up when reached and new rails laid in their place.

On this evidence so given defendant asked the court to charge the jury as follows: "If the jury believe from the evidence that R. H. Smith, the section-master of defendant, having charge of that section of defendant's track on which the accident occurred, was a competent, educated, prudent, careful, and skillful section-master; that in the discharge of his duty as such section-master he had passed over and examined and inspected that part of his section where the accident occurred, and that to all appearances said part of said section was in a safe, roadworthy condition for the passage of the passenger train the following morning when moving at the rate of fifteen miles an hour; that the defect in the rail afterwards broken was a latent defect undiscoverable by external observatian, and which could only
be discovered by taking the rail up and breaking it; that on
58 the morning of the accident the locomotive, tender, baggage,
and smoking car attached to the train had passed over the rail safely, and that the rail gave away under the ladies' coach of the train, because of the latent defect in it, not discoverable by external observation, and only discoverable by taking up and breaking it; that the train was moving at the time of the accident at the rate of fifteen miles an hour, they will find for the defendant.

This request was made of the court before its preparation of its charge to the jury and refused, but was considered by the court in preparing its charge. The court declined to give the charge employed by counsel, but prepared a charge in writing, which was read to the jury in the hearing of counsel for both parties, and when the same had been read counsel for defendant announced to the court that he was satisfied with the charge of the court as given, and made no further request or objection in reference thereto. The charge given by the court was as follows:

59 O'BRIEN *v.* R. R. CO.

GENTLEMEN OF THE JURY: The issue you are to determine from the evidence in this cause is, did the plaintiff receive the injuries alledged in her declaration? If so, was it occasioned by the fault of the defendant and its employees, and if by such fault, what amount of damages should be awarded in her favor against the defendant?

When the plaintiff entered defendant's car to be transported to Vicksburg she took the risk of all accidents and injuries on the way, except such as might arise from the fault of the defendant and its agents and employees; that the accident occur-ed, and that the injuries were received, by plaintiff, as alleged, is admitted, but it is insisted upon the part of defendant that the accident was unavoidable and not in any way attributable to any want of foresight,
60 skill, or wrong upon the part of defendant or its employees, or defect in the road-bed, cross-ties, rails, or appliances used in the transportation of the train and car in which the injury occurred.

Under the statute of the State regulating railways—provides that when the injury is proved it is *prima facie* evidence that it was the fault of the defendant and its employees, and throws upon the defendant railroad company the burthen of proving that the accident did not arise from any neglect or want of skill or other wrong
61 upon the part of the defendant and its employees, you will observe this rule of evidence in considering the testimony in this cause. You will determine from the evidence what caused the accident, and will then ascertain whether the cause of the accident could have been avoided by the strictest examination and effort which could have been reasonably applied in detecting and remedying the defect causing the accident.

It was the duty of the defendant, by a competent employee, to examine the railroad bed, cross-ties, and rails in its road as often as was necessary to keep it in safe condition for the passage of its cars. If the proof satisfies you that this was done, and that the defect could not have been discovered by the human eye, or such other application as was necessary to ascertain the defect, then the defendant was faultless and not liable for the accident, if such defect was the cause of the accident, but if this duty was neglected and the defect could have been detected by the human eye or such
62 other appliances as was necessary to discover the defects, then the defendant was in fault and liable to compensate plaintiff in such sum as may be just and reasonable for the injuries received.

If you shall find from the proof that the accident was caused other than in some defect in the road-bed, cross-ties, or rails, then you will examine and consider the evidence and determine whether or not it was by some cause which could not have been avoided by such strict examination, care, prudence, and foresight as was in the power of the employees and officers of the defendants to exercise, then you will find for the defendant; but if you should find that the accident was caused by the neglect or want of skill and prudence of which the defendant and employees could, by strict application, have avoided, then your verdict will be for plaintiff.

The defendant was not required to put its road-bed, cross-
63 ties, and rails in the best possible condition that railroads in other portions of the country may be put, but to put the same in such condition, so far as the experience of skillful employees in the exercise of such human skill and prudence as was necessary to afford a safe passage for their cars over their road.

If defects existed which could not have been detected by the human

eye or other necessary appliance, and the accident was caused alone by such defects, then it was a risk which plaintiff took upon herself.

Any defects which did not in any way contribute to causing the accident will not be considered by you in ascertaining the liability of defendant.

If you find for the plaintiff your next enquiry will be to ascertain from the proof as to what sum will be a just, fair, and reasonable compensation to the plaintiff for the injury she has sustained by reason of the accident. In doing so you will take into consid-
64 eration the expenses incurred by reason of the injuries received, including medical bills, hire of nurse, and other expenses already incurred, or which must in all probability accrue, in the future, arising from the injuries received; and also the loss of time by which plaintiff was deprived from attention to her domestic duties and deprivation of the power of moving from place to place, as her business or pleasure might require; also the physical and mental suffering the plaintiff has already endured, or will endure, in all human probability, suffer in the future, growing out of the injuries received. You will consider all the testimony in the cause without prejudice against either party, and give to it all such weight as you may deem it entitled to, and if you find that the accident was not caused by any neglect or wrong upon the part of defendant or its agents and employees, as explained to you in these instructions, your verdict will be for the defendant; but if you shall find that the accident was caused by the negligence or wrongful conduct of
65 defendant and its employees, then your verdict will be for the plaintiff for such reasonable damages as you may deem her entitled to for the injuries received under the rules stated.

At the time at which the court refused to give the above specified charge, as requested by counsel, the latter excepted, and now tenders this his third bill of exceptions, which he prays may be signed, sealed, enrolled, and made part of the record in this case. All of which is done the day, year, and term aforesaid, and before the jury retired from the bar.

R. A. HILL, *Judge.*

And on said 23rd day of November, A. D. 1882, the defendant filed with the clerk of said court its notice of motion in arrest of judgment in the words and figures following, to wit:

66 MARY E. O'BRIEN & HUSBAND
vs.
V. & M. R. R. COMPANY.

To Jas. M. McKee, E'q'r., clerk U. S. circuit court:

You are hereby notified and requested, should the jury find a verdict for the plaintiff in the above cause, not to enter judgment thereon until such time as a motion in arrest of judgment, which I purpose making in such contingency or exigency, shall be disposed of by the court.

W. L. NUGENT,
Att'y for Def't.

And on said 23rd day of November the following motion in arrest of judgment was filed in said cause, to wit:

In the Circuit Court of the United States for the Southern District of Mississippi.

MARY E. O'BRIEN and JOHN J. O'BRIEN, her Husband,
vs.
THE VICKSBURG & MERIDIAN RAILROAD COMPANY.

67 And now comes the defendant, on notice served upon the clerk and given in open court, and move the court in arrest of judgment herein upon the verdict of the jury returned into court, for the following reasons:

1. The declaration fails to set out any grounds of action against the defendant in favor of the plaintiffs, so as to entitle plaintiffs to verdict and judgment.

2. The declaration shows a suit by husband and wife for injuries to the wife travelling alone upon defendant's railroad and in defendant's cars, and a verdict for the plaintiffs generally which is not responsive to the demands urged & really sued for.

3. The husband had no right in law to recover damages from the defendant for injuries to the wife of the kind sued for and for bodily & mental pain and anguish experienced or suffered by her, and payment to him would not exonerate defendant.

4. The husband and wife are improperly joined in the suit, and, as presented, payment of the verdict would not exonerate the
68 defendant, nor would defendant be able to plead or rely upon the adjudication in any suit brought by either hereafter.

5. The declaration states no grounds of action against defendant, and was obnoxious to a general demurrer.

NUGENT & McWILLIE,
For Motion.

And afterwards, to wit, on the 1st day of December, 1882, the same being a day of the regular November term, 1882, the following judgment was rendered by said court and entered of record upon the minutes of said court, to wit:

MARY E. O'BRIEN *et al.*
vs.
VICKSBURG & MERIDIAN RAILROAD. } 2867.

This day again came the parties, by their attorneys, and the motion of defendant to arrest the judgment herein being argued and submitted, it is considered by the court that the said motion be, and the same is, hereby overruled, and that the plaintiffs have judgment upon the verdict of the jury herein. And thereupon it is
69 considered by the court that the said plaintiffs do have and recover of the defendant the sum of nine thousand dollars, their damages by the jury aforesaid assessed, together with their costs in this behalf expended, and interest upon said sum of nine thousand dollars at six per cent. per annum from this date until paid.

And on said 1st day of December, A. D. 1882, the defendant tendered to the court its fourth bill of exceptions, which was by the court allowed, and is in words and figures following, to wit:

70 In the Circuit Court of the United States for the Southern District of Mississippi. November Term, A. D. 1882.

MARY E. O'BRIEN and JOHN J. O'BRIEN, her Husband,

vs.

THE VICKSBURG AND MERIDIAN RAILROAD COMPANY.

Be it remembered that on this 1st day of December, A. D. 1882, at the term aforesaid of the court aforesaid, came on to be heard the defendant's motion for arrest of judgment herein, which is in the words and figures following, to wit:

In the Circuit Court of the United States for the Southern District of Mississippi.

MARY E. O'BRIEN and JOHN J. O'BRIEN, her Husband,

v.

THE VICKSBURG AND MERIDIAN RAILROAD COMPANY.

And now comes the defendant, on notice served upon the clerk and given in open court, and moves the court in arrest of
71 judgment herein, upon the verdict of the jury returned into court, for the following reasons:

1st. The declaration fails to set out any grounds of action against the defendant in favor of the plaintiff so as to entitle plaintiffs to verdict and judgment.

2. The declaration shows suit by husband and wife for injuries to the wife, travelling alone upon defendant's railroad and in defendant's cars, and a verdict for the plaintiffs generally, which is not responsive to the demands urged and really sued for.

3. The husband had no right in law to recover damages from the defendant for injuries to the wife of the kind sued for and for bodily and mental pain and anguish experienced or suffered by her, and payment to him would not exonerate defendant.

4. The husband and wife are improperly joined in this suit, and, as presented, payment of the verdict would not exonerate the defendant, nor would defendant be able to plead or rely upon the adjudication in any suit brought by either hereafter.

5. The declaration states no ground of action against defendant, and was obnoxious to a general demurrer.

NUGENT & McWILLIE,
For Motion.

72 On consideration of which said motion the court overruled the same, and ordered judgment to be entered on the verdict heretofore rendered in this case; to which ruling of the court defendant, then and there, in open court excepted, and tendered this his bill of exceptions, which it prays may be signed, sealed, enrolled and made part of the record in this case. All of which is accordingly done, this the day and year above written.

R. A. HILL, *Judge.*

And afterwards, to wit, on the 27th day of January, 1883, the defendant filed its petition for a writ of error, as follows, to wit:

UNITED STATES OF AMERICA, *Southern District of Mississippi:*

To the Honorable Justices of the Supreme Court of the United States:

And now comes the Vicksburg & Meridian Railroad Com-
73 pany, by W. L. Nugent, its attorney, and complains that in the records and proceedings, and also in the rendition of judgment in a suit between Mary E. O'Brien and John J. O'Brien, her husband, and the Vicksburg & Meridian Railroad Company, defendant, tried in the circuit court of the United States for said district, at the November term thereof, A. D. eighteen hundred & eighty-two, and in which judgment was rendered against said defendant on the 1st day of December, A. D. 1882, manifest error hath intervened, to the great damage of the said Vicksburg & Meridian Railroad Company:

Wherefore the said defendant prays for the allowance of a writ of error to operate as a supersedeas, and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

VICKSBURG & MERIDIAN RAILROAD COMPANY,
By W. L. NUGENT, *Att'y.*

Allowed and the clerk will issue the writ of error as prayed, returnable to the next term of the Supreme Court of the United States.

R. A. HILL.
74 *U. S. District Judge & presiding in the Circuit Court of the United States for the Southern District of Mississippi.*

And on said 27th day of January, A. D. 1883, the defendant filed in the office of the clerk of the circuit court of the United States for the southern district of Mississippi the supersedeas bond, which, with the approval of the judge of the said court thereon, is in the words and figures following, to wit:

In the Circuit Court of the U. S. for the Southern District of Mississippi.

MARY E. O'BRIEN & HUSBAND
v.
THE VICKSBURG & MERIDIAN RAILROAD COMPANY.

Know all men that the Vicksburg & Meridian Railroad Company and George C. Waddill and George M. Klein are held and firmly bound unto Mary E. O'Brien, of New Orleans, Louisiana, in the sum of eighteen thousand dollars, to be paid to the said Mary E.
75 O'Brien, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this 26th day of January, 1883.

Whereas the above-bound Vicksburg & Meridian Railroad Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the southern district of Mississippi:

Now, therefore, the condition of this obligation is such that if the above-bound Vicksburg & Meridian Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] VICKSBURG & MERIDIAN RAILROAD COMPANY,
By OTTO PLOCK, *President.* [SEAL.]
GEO. C. WADDILL. [SEAL.]
GEO. M. KLEIN. [SEAL.]

Sealed and delivered in presence of—
CHAS. A. PAGE.
Signed, sealed, and delivered in presence of—
JOHN D. GILLAND.

76 I hereby approve the foregoing bond and the securities thereon.

R. A. HILL,
U. S. District Judge for the District of Mississippi, and Presiding in the Circuit Court of the United States for the Southern District of Mississippi.

77 I, James M. McKee, clerk of the circuit court of the United States for the southern district of Mississippi, do hereby certify that the foregoing pages contain a true, full, and perfect transcript of the record of the cause lately pending in said court, wherein Mary E. O'Brien and John J. O'Brien, her husband, were plaintiffs, and the Vicksburg & Meridian Railroad Company were defendants (being the same cause mentioned in the original citation and writ of error hereto attached), as fully and completely as the same remains of record in my office.

Given under my hand and the seal of said court, hereto affixed, at office, in Jackson, in said district, this the 7th day of June, A. D. 1883.

[SEAL.] JAS. M. McKEE, *Clerk.*

Fee for transcript, $20.00; paid by defendant.

J. M. McKEE, *Clk.*

78 UNITED STATES OF AMERICA:

To Mary E. O'Brien & John J. O'Brien, or their attorneys of record, Mess. Buck & Clark, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi (whereof a copy is lodged for you), in

a certain cause wherein the Vicksburg & Meridian Railroad Company is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon'l R. A. Hill, United States district judge and presiding in the circuit court of the United States for said southern district of Mississippi, this 27th day of January, A. D. 1883.

R. A. HILL,
District Judge of the United States and Presiding Judge of the Circuit Court of the United States for the Southern District of Mississippi.

78½ UNITED STATES OF AMERICA, *Southern District of Mississippi:*

Personally appeared before the undersigned, a commissioner of the circuit court of said district, John D. Gilland, and made oath that he did, on this 29th day of January, 1883, deliver to E. D. Clark, a member of the firm of Buck & Clark, within mentioned, a true copy of the within citation in error.

JOHN D. GILLAND.

Sworn to and subscribed before me, this 29th day of January, 1883.

[SEAL.] LAY LINDSEY,
U. S. Commissioner.

[Endorsed:] No. 2867. Mary E. & Jno. J. O'Brien *ag't* V. & M. R. R. Co. Citation in error. Filed Jan'y 30, 1883. J. M. McKee, cl'k.

79 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the southern district of Mississippi, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Mary E. O'Brien and John J. O'Brien, plaintiffs, and the Vicksburg & Meridian Railroad Company, defendants, a manifest error hath happened, to the great damage of the said Vicksburg & Meridian Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and apeedy Justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of January, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] J. M. McKEE,
Clerk of the Circuit Court of the United States for the Southern District of Mississippi.

Allowed by—
R. A. HILL,
U. S. District Judge, and presiding in the Circuit Court of the United States for the Southern District of Mississippi.

[Endorsed:] No. 2867. Vicksburg & Meridian Railroad Company *v.* Mary E. O'Brien & Jno. J. O'Brien. Writ of error. Filed Jan'y 27, 1883. J. M. McKee, c'lk.

Endorsed on cover: S. Mississippi C. C. U. S. No. 524. The Vicksburg and Meridian Railroad Company, plaintiff in error, *vs.* Mary E. O'Brien and John J. O'Brien. Filed 25 June, 1883.

119-99

Supreme Court of the United States.

October Term 1883.

THE VICKSBURG & MERIDIAN RAILROAD COMPANY, plaintiff in error,
vs.
MARY E. O'BRIEN and JOHN J. O'BRIEN. } No. 888.

The defendants in error move the court for a rule upon plaintiff in error requiring it to give a new supersedeas bond.

Because since the acceptance of the present supersedeas bond George M. Klein, one of the sureties thereon, has become wholly insolvent, and on the 21st day of November, 1883, made a general assignment of all his property for the benefit of his creditors, whose claims amount to over a million of dollars; and said bond is now an insufficient security to defendants in error.

EDWARD D. CLARK,
Attorney for Defendants in Error.

I call attention to Martin *v.* Hazard Powder Co., 3 Otto, 302, and Jerome *v.* McCarter, 21 Wall., 17.

J. Z. GEORGE.

THE STATE OF MISSISSIPPI, *Warren county,* } *ss.*

I, George T. Hardy, clerk of the Chancery Court in and for said county, and as such the custodian of the record of deeds of said county, do hereby certify that on the 21st day

of November, 1883, George M. Klein, of said county, filed in my said office a general assignment conveying to one George S. Irving, trustee, all his property of every kind and description for the benefit of creditors, which deed now remains of record in my said office in Deed Book 56, page 308 *et seq.*

In testimony whereof I hereto set my hand and the seal of said court this the 19th day of March, 1884.

[SEAL.] GEO. T. HARDY, *Clerk.*

THE STATE OF MISSISSIPPI,
Southern district thereof.

At Vicksburg, in said district, March , 1884, before the undersigned, a commissioner of the Circuit Court of the United States in and for said district, this day personally appeared Edward D. Clark, who, being duly sworn, on oath says:

1. That he is the same person who is attorney for the defendants in error in the case of The Vicksburg and Meridian Railroad Company *vs.* Mary E. O'Brien et al., now pending in the Supreme Court of the United States on writ of error from the Circuit Court of said district.

2. That he knows George M. Klein, one of the sureties on the supersedeas bond in said cause; that he is the same person referred to in the annexed certificate of the clerk of the Chancery Court of Warren county, Mississippi, and that he (affiant) knows, of his own knowledge, that said Klein, since the signing of said bond, has become wholly insolvent, has made a general assignment for the benefit of creditors, and has no property subject to execution.

3. The said affiant further states that he knows George C. Waddill, the other surety on said bond, and that he has no property in the State of Mississippi subject to execution of value sufficient to satisfy the judgment appealed from if it should be affirmed.

EDW'D D. CLARK.

Sworn to and subscribed before me this 22d day of March, A. D. 1884.

[SEAL.] L. M. LOEWENBERG,
U. S. Comm'r.

In the Circuit Court of the United States for the southern district of Mississippi.

MARY E. O'BRIEN et al.
vs.
THE VICKSBURG AND MERIDIAN RAILROAD COMPANY.

In the matter of the supersedeas bond in the above cause.

I, Robert A. Hill, one of the judges of said court, do hereby certify that in approving the supersedeas bond given on appeal to the Supreme Court in the above cause I considered the name of George M. Klein thereto as making the same amply good, as he was known to me to be the owner of a large amount of real estate situated in said district; *and without the name of said Klein I would not have approved said bond, and I would not now consider the same sufficient if presented to me for approval.*

Witness my hand this March 24, 1884.

R. A. HILL, *Judge.*

To the VICKSBURG AND MERIDIAN RAILROAD COMPANY *and* WILLIAM L. NUGENT, *Attorney for said Company:*

Please take notice that on the 1st Monday in May next,* or so soon thereafter as counsel can be heard, defendants in error in the case of "The Vicksburg and Meridian Railroad Company *v.* Mary E. O'Brien *et al.*," now pending in the Supreme Court of the United States on writ of error from the Circuit Court for the southern district of Missis-

* See additional notice, next page.

sippi, will call up for hearing the annexed motion for a rule on plaintiff in error to give a new supersedeas bond in said cause, and will submit the same with the certificates and affidavits thereto and hereto attached.

EDWARD D. CLARK,
Attorney for Defendants in Error.

Due service of the above notice is hereby acknowledged this 8th day of April, 1884.

W. L. NUGENT,
Attorney for said Plaintiff in Error.

In the Supreme Court of the United States.

VICKSBURG AND MERIDIAN RAILROAD COMPANY, plaintiff in error,
vs.
MARY E. O'BRIEN *et al.*, defendants in error.

To the VICKSBURG AND MERIDIAN RAILROAD COMPANY *and* Mr. W. L. NUGENT, *their Attorney:*

You will please to take notice that in consequence of the announcement of the Supreme Court that it will adjourn for the term on the 1st Monday in May, the notice heretofore given you of the hearing of a motion for a new supersedeas bond in the above-mentioned cause to be had on that day is recalled; and you are now hereby notified that said motion will be submitted on Monday, the 21st day of April, instant, or so soon thereafter as counsel can be heard; and you are requested to attend accordingly.

EDWARD D. CLARK,
Attorney for Defendants in Error.

Service of the above notice by delivery of a copy thereof to me at my office in Jackson, Mississippi, is hereby acknowledged this the 9th day of April, A. D. 1883.

W. L. NUGENT,
Attorney for Plaintiff in Error.

THE STATE OF MISSISSIPPI,
Southern district thereof.

At Vicksburg, in said district, April 12, 1884, before the undersigned, a commissioner of the Circuit Court of the United States in and for said district, this day personally appeared Edward D. Clark, the above named, who made affidavit that the signatures of W. L. Nugent, attorney for plaintiffs in error in the above-mentioned cause, to the acknowledgments of the above notices are genuine.

Also that he delivered copies of said notices and of the motion and certificates and affidavits thereto attached, to Isaiah Hardy, general superintendent and managing agent of plaintiff in error at Vicksburg—the first notice on April 5th, 1884, and the second notice on April 8th, 1884.

EDWARD D. CLARK.

Sworn to and subscribed before me this 12th day of April, 1884.

[SEAL.] L. M. LOEWENBERG,
U. S. Comm'r.

[Endorsed:] Supreme Court U. S.; 1883, October Term; No. 888; The Vicksburg & Meridian R. R. Co., pl'ff in error, *vs.* Mary E. O'Brien et al.; Motion for new supersedeas bond, with proof of notice, affidavits, & certificates. Office Supreme Court U. S.; Filed Apr. 15, 1884; James H. McKenney, clerk.

Robert Clarke & Co., Printers, Cincinnati. | *March, 1886.*

Supreme Court of the United States.

OCTOBER TERM, 1885.

The Vicksburg & Meridian Railroad Company,

Plaintiff in Error

No. 238.] *vs.*

Mary E. O'Brien and John J. O'Brien,

Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

On November 29, 1881, defendants in error, plaintiffs below, filed in the Circuit Court of Warren County, Mississippi, their declaration (Record, p. 1), alleging that, on the day of September, 1881, Mary E. O'Brien, being a passenger in one of the trains of the Vicksburg and Meridian Railroad Company, the car in which she was seated was, by the carelessness, negligence, and unskillfulness of the railroad company, thrown from the track, and

said Mary E. O'Brien injured, and, as the declaration alleges, "plaintiffs," "forced and obliged to pay out large sums of money," etc., "in endeavoring to have said Mary E. O'Brien cured." And, as damages, plaintiffs claim $30,000, and their costs. Thereafter, the railroad company, on the 5th of December, 1881, filed (Rec., p. 3) a plea of not guilty, concluding to the country, and gave notice (Record, p. 4) of intention to show that said Mary E. O'Brien contributed to the injuries she had sustained, in such manner as not to entitle to maintain her action; and, in addition, that the railroad company had paid all damages sustained by plaintiff long before the institution of the suit.

Thereafter, on March 6, 1882, the railroad company filed (Rec., pp. 4 and 5) petition and bond for removal into the Circuit Court of the United States for the Southern District of Mississippi. An order of removal was made on said 6th day of March, 1882, and the papers filed in the Circuit Court of the United States for the Southern District of Mississippi on the 20th day of April, 1882. In the latter court, the case was tried, November, 23, 1882 (Rec., p. 6), which rendered a verdict of $9,000 for the plaintiffs, and the railroad company, defendant, filed a motion in arrest of judgment. Judgment was entered upon the verdict, December 1, 1882, for $9,000, and costs. During the progress of the trial, three bills of exceptions were taken and allowed, of which No. 1 begins on page 7, No. 2 on page 15, and No. 3 on page 20, of the Record in this court.

ARGUMENT.

I.

EXCEPTIONS TO EVIDENCE.

The first exception taken was to the reading of a paper, attached as an exhibit to the deposition of Dr. R. A. Quinn, purporting to be a statement made on November 26, 1881—that is to say, three days before suit brought—of the condition of Mrs. O'Brien when he saw her a few hours after the accident in which she was injured, and of the condition in which she remained for some time afterward. The statement was thus a declaration made by a third party to one of the parties to the suit of matters existing long before, as well as at the time of suit brought. On what principle it was deemed admissible by the court below, we can not conceive. It is not pretended even that the statement or its contents had ever been communicated to the plaintiff in error before the taking of Dr. Quinn's deposition. It might, perhaps, have been used by the witness to refresh his memory; but, as evidence in itself, it was no more competent than if it had been written by some other person. How, we ask, can a fact, *e. g.*, the condition of one after an injury to the person, be proved by showing what somebody said about it, whether contemporaneously or afterwards? Dr. Quinn was the medical attendant of Mrs. O'Brien, and the facts of her condition were, perhaps, within his knowledge. If so, certainly he should have been required to testify to those facts; and the admission of a statement, whether oral or written, purporting to set forth what he had said about the fact to be proved, was clearly error.

In the case of *Russell* v. *Hudson R. R. R. Co.*, 17 N. Y. 134, Russell had suffered an injury by the alleged negligence of the conductor of a gravel train, on which he (Russell) was riding. In this case, as in the case at bar, a physician's memorandum was admitted, and with relation to that admission the court say, at page 139:

"Upon the trial, the plaintiff's counsel offered in evidence a memorandum made by the witness then under examination (*i. e.*, the physician of plaintiff), relating to the extent of the plaintiff's injuries. The witness stated that the memorandum was made at the time of its date, which was about the time of the accident, and that, when it was made, he knew it to be true. The reading of this memorandum in evidence was objected to, but was permitted. It is insisted that a memorandum thus made can only be referred to for the purpose of refreshing the recollection of the witness; but can, under no circumstances, be made evidence *per se*. That, unless the witness, after thus refreshing his memory, can swear to the facts from recollection, his testimony, as is said by Mr. Phillips, in his work on Evidence, 'will amount to nothing.' (1 Phil., Ev. 289.)"

The court go on to state that the English rule is more rigid than that usually adopted in this country, in that it excludes such a memorandum itself in any case. But they say, on page 140:

"Here (i. e. in the U. S.), a witness who says that, after refreshing his memory by a written memorandum made by himself at or about the time of the occurrence, he can not recollect the facts, but that he is confident that he knew the memorandum to be correct when it was made, is not required to swear to the facts in positive terms, but the memorandum itself is received in connection with his oral testimony. I confess my decided preference for the American practice. . . . . .

"It is, however, an indispensable preliminary to the introduction of such a memorandum in evidence, that it should appear as it did in the case of *Halsey* v. *Sinsebaugh* (15 N. Y. 485), that the witness is unable with the aid of the memorandum to speak from memory as to the facts.

It is only as auxiliary to, and not as a substitute for the oral testimony of the witness, that the writing is admissible. It is the duty of the court, in all such cases, to see, before receiving the memorandum in evidence, that it was made at or about the time of the transaction to which it relates, that its accuracy is duly certified by the oath of the witness, and that there is a necessity for its introduction on account of the inability of the witness to recollect the facts. In the present case, for aught that appears, the witness had a distinct recollection of all the facts, independent of the memorandum. The latter, therefore, was improperly admitted." "The judgment should be reversed, and there should be a new trial, with costs, to abide the event."

Not to multiply authorities in support of a proposition so consonant with reason, we avow our preference for the American rule, as laid down in the quotation just made. But, even the simple requirements of that rule were not complied with in the case at bar. Indeed, we may describe the action of the trial court in the very words of the opinion in *Russell* v. *R. R. Co.* (*supra*):

"In the present case, for aught that appears, the witness had a distinct recollection of all the facts, independent of the memorandum. The latter, therefore, was improperly admitted."

So, in the case at bar, the bill of exceptions shows no reason why the witness should not have been required to testify directly, if at all, to the facts, without even refreshing his memory by reference to the memorandum. We insist, therefore, that, in the circumstances, no foundation was laid for the introduction of Dr. Quinn's statement, and that its admission was error.

On page 12 of the record is the part of the testimony of T. R. Roach as to statements alleged to have been made by the engineer of the train respecting the speed at which the train was moving at the time of the accident. This testimony was admitted over the objection of plaintiff in

error. The conversation detailed by the witness was not part of the *res gestae*, nor was it made by anyone who had authority to bind the railroad company.

The speed of the train at the time of the accident was a fact to be proved like any other, though in its nature not susceptible of establishment with absolute certainty. The engineer might have been called, and perhaps his experience might have added weight to his testimony. But what he said when not under oath or open to cross-examination ought surely not to have been admitted. There is no authority in an engineer to bind a railroad company by admissions or statements of this kind, made in a moment of haste and excitement. They are likely to have had upon the jury an effect prejudicial to the plaintiff in error.

An early authority on this point is *Luby* v. *H. R. R. R. Co.*, 17 N. Y. 131, which was an action for damages occasioned by the negligence of the railroad company in running a car drawn by horses through a street. At page 132, Comstock, J., says:

"Mason, the police officer, was allowed to testify . . . . . that the driver, on being arrested, assigned as a reason why he did not stop the car, that the brakes were out of order."

And again, on page 133, he says:

"The declarations of an agent or servant do not in general bind the principal. . . . . To be admissible they must be in the nature of original and not of hearsay evidence. They must constitute the fact to be proven, and must not be the mere admission of some other fact."

The evidence was held incompetent, and, on page 134, the court said:

"What effect the jury gave to the evidence we can not tell. I see no way of getting over this difficulty."

And a new trial was ordered.

In the case of the *Michigan Central Railroad Co.* v. *Gougar*, 55 Illinois, 503, it was held that the declarations of an engineer in charge of an engine, made subsequently to the happening of an accident, could not be received as evidence against the corporation.

The case of *Morse* v. *The Conn. River R. R. Co.*, 6 Gray (Mass.), 450, is often cited as sustaining the admissibility of such declarations. But a reading of the case discloses that the declaration of a baggagemaster (the case was one of damages for lost baggage) was held admissible, because it was within the scope of the declarant's duty to give information about baggage and to account for it.

In the later case of *Lane* v. *Bryant*, 9 Gray, 245, the same court laid down, or rather affirmed, the rule for which we contend. In the syllabus of the last-mentioned case it is said, page 245:

"In an action to recover damages sustained by a collision between the defendant's and the plaintiff's carriages, evidence that the defendant's servant, who had charge of his carriage, immediately after the collision and while the defendant was being extricated from his carriage, and while the crowd was about, said that the plaintiff was not to blame, is not admissible, either as part of the *res gestae*, or to contradict the testimony of the servant."

In the case of *Curls* v. *The C. R. I. & P. R. R. Co.*, 11 Am. & Eng. R. R. Cases, 85, the statements of the conductor after he ejected the plaintiff were held inadmissible on principle, although in the particular case the court was of the opinion that the conductor's declarations were

of such a sort that their admission or exclusion could not have signified to either party.

In *Dietrich* v. *B. & H. S. R. R. Co.*, 11 Am. & Eng. R. R. Cases, 115, Alvey, J., at page 120, says:

"In the course of the trial, a question arose upon the offer by the plaintiffs to prove certain declarations of Bowers, the driver, made to the brother of the party injured, about half an hour after the injury was received, as to the cause of its occurrence. . . . . Upon objection, the court held these declarations to be inadmissible. . . . . .

"We know of no principle upon which the court could have held otherwise than it did. It does not appear that the driver had been examined as a witness for the defendants, and the declarations were not, therefore, offered to impeach his testimony. . . . . There was no necessary connection between the declarations offered and the act complained of, the declarations in no manner forming any part of the *res gestae;* and the power of the driver to make such declaration to affect his principal is not to be inferred from his simple employment to drive and conduct the car."

Not to quote to weariness from the authorities, we content ourselves with citing to the court the following:

Furst v. *Railroad Co.*, 72 N. Y. 542.
Railroad Co. v. *Hinton*, 33 Ind. 335.
Sims v. *Railroad Co.*, 28 Ga. 94.
Enos v. *Tuttle*, 3 Conn. 250.

The other proof as to the speed of the train at the time of the accident consists in evidence (referred to in Rec., p. 12) showing that the schedule time allotted for the passage of the train from Jackson to Vicksburg was two hours and thirty minutes, the distance being forty-five miles, and the testimony introduced by the defendant (Rec., p. 20) showing the rate of speed to have been fifteen miles an hour. It may be said that the difference between fifteen and eighteen miles an hour is but a small matter, but who can say but

that to the jury this small difference constituted the difference between negligence and due care. As the court said in *Luby* v. *Railroad Co.*, 17 N. Y. 131, (*vide supra*):

"What effect the jury gave to the evidence we can not tell. I see no way of getting over this difficulty."

The next exception in order is that taken to the admission of a report made by E. F. Raworth, then superintendent of the plaintiff in error's railway to its president on the first of March, 1880 (Rec., pp. 12, 13, and 14).

The objections to this report are various. In the first place the report was made on the first of March, 1880, while the accident happened September 16, 1881, eighteen months later. And it is plain that the observations upon which the report was based must have been made some appreciable time before its date.

Secondly, the report specifies no portion of the plaintiff in error's railway which was laid with the kind of rails described in it. So far as computation will serve, the report says that there were 81½ miles of one kind of rail and twenty-five miles of another kind, in all thus describing 106½ miles. But as the declaration of defendant in error avers, the Vicksburg and Meridian Railroad Co.'s railway runs from Vicksburg to Meridian, which is about 140 miles, as may be seen from the map. So that as to some thirty-four miles of track the report is silent.

Moreover, there is nothing whatever in the report which would justify an inference that the spot where the accident took place was a part of that as to which the report recommends repairs or renewals. Indeed, the accident was occasioned as plaintiff's proof tends to show (Rec., p. 12) by a broken rail and a defective cross-tie under it, a defect which was specific, confined to a space of a few inches,

and not in any way to be proved by proof that an unspecified portion of the railway was out of repair. The report itself states (Rec., p. 13) that one mile of the 81½ miles of fifty-pound rail had been renewed. How can the report show either that the scene of the accident was or that it was not included in that one mile? The whole report was irrelevant and incompetent, and its admission accomplished nothing but to prejudice the jury and mislead them with an impression not properly deducible from it. Consider, also, the distance in time of the report from the accident. The report was made in March, 1880, while the accident wherein Mrs. O'Brien was injured occurred in September, 1881. What relevancy to the condition of the railway in 1881 can a report have which speaks only to its condition in the first months of 1880? And if it could be supposed to show the general condition in 1881, how could it show the particular defective rail and cross-tie which caused the accident, since the report itself shows that the recommendations for the laying of new rails do not apply to the whole of the company's railway? And this admission of incompetent evidence was aggravated by the refusal of the court below to admit the reports covering the same period of the financial officers of plaintiff in error (Rec., pp. 15–19), which show large expenditures of money for the very purpose recommended in the superintendent's report. Will it be held that a report of a superintendent as to condition of permanent way may be admitted to show a specific defect, when the report does not even intimate any application to the spot where the defect existed, when its statements are of the most general kind, when its references are to a period long antedating the discovery by any one, so far as appears, of the specific defect? And if such a report be admitted under such conditions, shall the ad-

verse party be precluded from showing that even while the observations on which the report is based were making, it was expending large sums in the line of the report's recommendations?

CHARGE OF THE COURT.

At page 20 of the Record will be found certain evidence introduced by the plaintiff in error, and on page 21 a special charge based thereon asked by plaintiff in error, but refused by the court. To this refusal an exception was taken at the time, but the general charge was accepted by counsel for plaintiff in error, defendant below, so far as concerned the law in relation to negligence and the duty of the carrier. There is, however, a single point in the charge of the court, which is so far objectionable as to require a reversal of the judgment, and a new trial. It is touched upon by the fourth ground of the motion in arrest of judgment (Rec., p. 24, and again on p. 25), which is as follows:

"4. The husband and wife are improperly joined in the suit, and, as presented, payment of the verdict would not exonerate the defendant, nor would defendant be able to plead or rely upon the adjudication in any suit brought by either hereafter."

We are aware that a motion in arrest of judgment addresses itself to errors apparent on the face of the record. The declaration of the defendants in error, plaintiffs below, alleges (see Rec., p. 2) that

"the said plaintiffs have been forced and obliged to pay out large sums of money and incur large expenses and loss in endeavoring to have the said plaintiff, Mary E. O'Brien, cured of her said injuries, and in and about her necessary support and maintenance; and the said plaintiffs have otherwise suffered great damage, to-wit, the amount of thirty thousand dollars in all," etc.

And the court in charging the jury said (Rec., p. 23):

"If you find for the plaintiff your next inquiry will be to ascertain from the proof as to what sum will be a just, fair, and reasonable compensation to the plaintiff for the injury she has sustained by reason of the accident. In doing so you will take into consideration the expenses incurred by reason of the injuries received, including medical bills, hire of nurse, and other expenses already incurred, or which must in all probability accrue in the future, arising from the injuries, and also the loss of time by (for?) which plaintiff was deprived from attention to her domestic duties," etc.

We contend that husband and wife joined in an action as plaintiffs for damages by reason of an injury to the wife, can not, as was attempted in the case at bar, seek in the same action to recover the medical expenses and other charges in and about the wife's illness, and damages for the loss of the wife's time and the like. These are exclusively damages to the husband, and must be sued for by him alone, and if, as was done in the case at bar, they are permitted to be sued for by husband and wife as joint plaintiffs, and are included in a verdict of a single sum, the defendant has no security against another action for them in the proper form by the husband alone. For clearly the question will not become *res adjudicata* by such a judgment as that in the case at bar. The declaration, though it seeks a recovery for medical expenses and the like, does not separate their amount from that of the other damages to the wife alone, the judgment merely recites (Rec., p. 24) that

"it is considered by the court that the said plaintiffs do . . . recover of the defendant the sum of nine thousand dollars, their damages by the jury aforesaid assessed," etc.

If it should be asserted that the medical expenses had in fact been recovered in the case at bar, the reply would be that such damages are sole, and that it is legally impossible that they should have been recovered in a joint action. And of what advantage could the moral certainty of the plaintiff in error, that it had been sued for and had suffered recovery of these damages in the case at bar be to it in subsequent action for them by the husband alone?

In Rorer on Railroads, page 690, it is said:

"An action against the company for injuries to a married woman, must, at common law, be brought in the name of both the husband and wife, or, if merely for the loss of service or her society, occasioned to the husband by the wrong or injury, or for expenses for medical attendance and cure growing out of the same, then in the name of the husband alone."

The leading case in point is *Fuller* v. *Naugatuck R. R. Co.*, 21 Conn. 557; it is also reported in 2 Am. Railway Cases, 161, from which we quote. In the opinion of the court in that case it is said at page 172:

"It is claimed that the declaration asks for damages on account of the wife's personal injury, and, also, for the expenses of her cure." "Each of the counts, after stating the wife's personal injury, and the extent of it, then goes on to say that by means of the injury she became sick, was prevented from attending to her necessary affairs, and also, thereby, they, the said plaintiffs, were forced and obliged to, and did necessarily pay, lay out, and expend a large sum of money, to wit: the sum of two hundred dollars in and about endeavoring to be cured of the bruises," etc.

"It is clear that the plaintiffs could not recover for the wife's personal injury, and also, for the expenses of her cure in the same action. On the former ground of damages, the husband would have no interest, while the latter would accrue to him alone. · · · But we do not think this declaration open to that objection. Indeed, it may fairly be doubted whether it was framed with that object in view. The ground of the action was the wife's personal injury

alone, otherwise, she could not have been made a party at all, and we think, the statement in regard to the expenses of her cure, may well enough be considered as descriptive of the extent of her injury rather than as a distinct and substantive ground of damages." . . . .

And the court go on to say that there being another and well pleaded ground of damages in the declaration, the insertion of a count for medical expenses could not vitiate the whole. The quotation and the whole opinion, beside establishing the principle for which we contend, illustrate a special embarrassment under which the plaintiff in error labored in the case at bar. If by demurrer to the declaration it had been objected that damages appertaining to the husband only were sought in that portion alleging outlays for medical expenses, it would be answered that the words did not import a cause of action, but were merely descriptive of the extent of the injury. It does not appear from the printed record that any evidence as to medical expenses and the like was offered, but yet the court in that part of the charge already quoted directed the jury to include them in any verdict for plaintiff. It is thus plain that whatever a first impression from a simple reading of the record might give, there were sought to be recovered in the case at bar both damages for the injury pure and simple to the wife, which in some states must be sued for by both husband and wife and in others by the wife alone, and the charges and expenses of her cure as also damages for loss of service, which appertain to the husband solely, and can nowhere be recovered except in a suit by him alone. In many, perhaps most of the states, a married woman may now sue alone with respect to injuries to her separate estate, and this right has in some cases been construed to extend to injuries to her person, but the costs and expenses of her illness, it is the duty every-where of the husband to

defray, and he is still entitled to her services, at least in domestic affairs, and to her society. In these, which are the husband's sole perquisite or privilege, the wife can have no interest, and for damage to these no joint action can be maintained or joint judgment recovered, for the very obvious reason that while a payment to the wife can not discharge a debt to the husband, either of two joint judgment creditors can enforce payment of the judgment. Yet in the case at bar a joint action was brought, as the record shows, for this sole damage, and a joint judgment recovered. In the circumstances, if this judgment be allowed to stand, on what ground is plaintiff in error to escape a second payment to the husband for the same damage? In the case of *Baltimore City P. Railway Co.* v. *Kemp and Wife*, 18 Am. and Eng. R. R. Cases, 220, the court in their opinion say, at page 221:

"Now, according to the common law upon this subject, it is perfectly well settled that in an action brought for personal injuries suffered by the wife, the husband and wife must join, and the declaration must conclude to their damages, but in such action care should be taken that there be not included any cause of action for which the husband should sue alone, as for instance for loss of services, expenses incurred, and the like. *Dengate and Wife* v. *Gardiner*, 4 M. and W. 6; *Stoop and Wife* v. *Swarts*, 12 Serg't. & R. 76; 1 Chitt. Pl. 82, 83."

In addition to the authorities already cited, we desire to call the attention of the court also to 1 Minor's Institutes, p. 350, 3*k*.

We ask that the judgment in the case at bar be reversed.

Respectfully submitted,

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